BALL JANIK LLP

ATTORNEYS

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005
www.balljanik.com
TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532

lgitomer@dc.bjllp.com

March 30, 2005

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, DC 20423

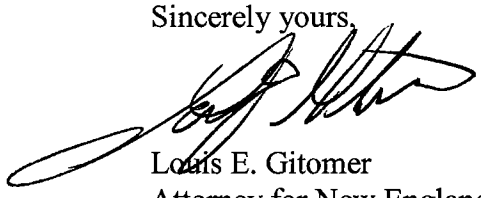
RE: Finance Docket No. 34612, *Boston and Maine Corporation and Springfield Terminal Railway Company v. New England Central Railroad, Inc.*

Dear Secretary Williams:

Enclosed for efiling are the Reply of New England Central Railroad, Inc., inPDF and Word format. Thank you for your assistance.

If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for New England Central Railroad, Inc.

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34612

BOSTON AND MAINE CORPORATION AND
SPRINGFIELD TERMINAL RAILWAY COMPANY
v.
NEW ENGLAND CENTRAL RAILROAD, INC.

REPLY TO PETITION FOR RECONSIDERATION

Gary A. Laakso, Esq.
Vice President Regulatory Counsel
RailAmerica, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: NEW ENGLAND
CENTRAL RAILROAD, INC.

Dated: March 30, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34612

BOSTON AND MAINE CORPORATION AND
SPRINGFIELD TERMINAL RAILWAY COMPANY
v.
NEW ENGLAND CENTRAL RAILROAD, INC.

REPLY TO PETITION FOR RECONSIDERATION

New England Central Railroad, Inc. ("NECR") replies in opposition to the Petition for Reconsideration in Part (the "Petition") filed by the Boston and Maine Corporation ("B&M") and Springfield Terminal Railway Company ("ST") (jointly referred to as "Complainants") on March 10, 2005. Specifically, NECR opposes Complainants request that the Surface Transportation Board (the "Board") reconsider its decision not to interpret Section 7.1 of the trackage rights agreement (the "Agreement") imposed by in *Amtrak—Conveyance of B&M in Conn River Line in VT & NH*, 6 I.C.C.2d 539 (1990) (the "*Agreement Decision*").

BACKGROUND

The genesis of this proceeding was the derailment of one of Complainants' trains on NECR's track. As a result of the derailment, NECR and Complainants sought damages from each other. Complainants sought damages from NECR for losses allegedly caused by the derailment by filing a Formal Complaint and Petition for Declaratory Order (the "Complaint") with the Board on November 9, 2004. NECR sought compensation from Complainants for damages to NECR's rail line caused by Complainants' derailment by filing a Complaint in the

United Stated District Court for the District of Massachusetts, Civil Action No. 04-30235-MAP, filed on December 3, 2004.

After NECR answered the Complaint, the Board carefully weighed all of the issues and dismissed the Complaint.[1]

THE APPEAL

Complainants appeal the Board's decision not to interpret Section 7.1 of the Agreement. They contend that the Board is "uniquely qualified" to interpret Section 7.1 because it was imposed by the Interstate Commerce Commission (the "ICC"), the Board's predecessor. Complainants also contend that the ICC could not have intended "to absolve a track owner whose track is in substandard condition due to its own gross negligence or willful misconduct from liability for a derailment resulting from the condition of the track?" Petition at 2. Complainants have conceded that "the courts are better able to evaluate the facts attendant upon derailment" and "to handle tort and breach of contract claims." *Id.*

NECR'S RESPONSE TO PETITION

NECR contends that the Petition should be denied because (1) Complainants have failed to show that the *Complaint Decision* will be affected materially because of new evidence or changed circumstances or involves material error, as required by 49 C.F.R. § 1115.3(b)(1 and 2); and (2) Section 7.1 of the Agreement should only be interpreted if the facts alleged by Complainants require an interpretation.

1. Complainants have not justified reconsideration under the Board's rules.

---

[1] *Boston and Maine Corporation and Springfield Terminal Railway Company* v. *New England Central Railroad, Inc.*, STB Finance Docket No. 34612 (STB served February 24, 2005) (the "*Complaint Decision*").

The Complaint Decision is an administratively final decision. As such, it is appealable to the Board as a discretionary appeal under 49 C.F.R. §1115.3(a). The Board will only grant the Complainants' Petition if they show that "the prior action will be affected materially because of new evidence or changed circumstances" or "the prior action involves material error." 49 C.F.R. § 1115.3(b)(1 and 2).

NECR contends that Complainants have not introduced new evidence or changed circumstances. Hence, Complainants cannot meet their burden of showing that new evidence or changed circumstances will affect materially the *Complaint Decision.*

NECR also contends that Complainants arguments have not demonstrated that the Board committed material error in the *Complaint Decision.* Instead, Complainants build their argument upon factually and legally distinguishable precedent, as well as internally inconsistent argument.

Complainants begin their material error argument by stating that the Board is uniquely suited to determine the meaning of the Agreement based upon language in *Rymes Heating Oils, Inc.* v. *Springfield Terminal Ry. Co.*, 358 F.3d 82, 91 (1st Cir. 2004) ("*Rymes*").

In an earlier proceeding, the Board interpreted the *Agreement Decision* and the Agreement and concluded that ST did not have the right to provide exclusive rail service to Rymes Heating Oils, Inc. ("RHO"). The Board found that NECR could serve RHO with rail service in competition with ST. The Board did not reach claims of service failures resulting in damages to RHO by ST. *Rymes Heating Oils, Inc.–Petition for Declaratory Order*, STB Finance Docket no. 34098 (STB served July 19, 2002), at 5 (the "*Declaratory Order*").

After receiving the Board's *Declaratory Order*, RHO sought damages from ST for failure to provide common carrier service through a suit in the United States District Court. *Rymes* involved the question of whether RHO could seek damages from ST for failure to provide

common carrier rail service under 49 U.S.C. § 11101 before the United States District Court for the District of Massachusetts without first bringing the matter to the Board. The District Court dismissed the complaint, and the Court of Appeals affirmed, concluding that the Board had primary jurisdiction over damages for failure to provide common carrier service. Complainants are not alleging that NECR has failed to provide common carrier service. The issue between Complainants and NECR is liability for damages caused by Complainants' derailment on NECR's rail line while operating under a trackage rights agreement.

Complainants next argue that the Board erred in the *Complaint Decision* when it concluded that Section 7.1 of the Agreement was not in dispute at the time the Agreement was adopted.

Complainants submit the Interim Trackage Rights Agreement, the draft agreement filed by the Central Vermont Railway, Inc. ("CV"), and the draft agreement filed by BM. The proposals for Section 7.1 submitted by both CV and BM differed from the Interim Trackage Rights Agreement. However, as Complainants admit, "BM's brief made no mention of liability issues and the parties' subsequent responses to one another did not address liability either." Petition at 4. Complainants attempt to rationalize their failure to appeal the *Agreement Decision* to either the ICC or the Court of Appeals based on the statement on page 554 that "the revisions will not change the essence of section 7."

Now, however, Complainants are essentially appealing the *Agreement Decision* and asking the Board to amend the Agreement. NECR was not a party to the negotiations or litigation over the Agreement. It is the successor-in-interest to CV. In NECR's opinion, if the provisions of Section 7.1 proposed by CV and BM to the Board were in dispute, BM would have commented on them in its brief and appealed the *Agreement Decision*. BM did neither. NECR

contends that Complainants should not be able to use BM's own failure in 1990, as the basis for a finding of material error in 2005.

Complainants next argue that trackage rights imposed by the Board should be uniformly interpreted on a national basis, while at the same time, the Board should apply the law of the District of Columbia to its interpretation of the Agreement. NECR has a difficult time envisioning a uniform national interpretation of the terms of trackage rights agreements when the law of one jurisdiction is to be given primacy in the interpretation to the exclusion of the law of all other jurisdictions. NECR agrees that "the primary issues presented here are more properly the subject of adjudication before the courts." *Complaint Decision* at 4. A U.S. District Court is experienced in the interpretation of contracts and application of the appropriate law. The history of the Agreement is so unique that interpretation of the Agreement should not serve as precedent for the interpretation of other trackage rights agreements.

Complainants have failed to provide new evidence or changed circumstances, and have not shown that the *Complaint Decision* involved material error. Therefore, NECR urges the Board to deny the Petition for failing to meet the burden of 49 C.F.R. § 1115.3(b)(1 and 2).

2. The interpretation of Section 7.1 of the Agreement is not necessary.

Complainants allege that Section 7.1 of the Agreement must be interpreted in order to prevent NECR from avoiding liability where NECR breached its duty to Complainants "in a grossly negligent, reckless, and willful manner." Complaint at 5, paragraph 35. Complainants have not established that NECR breached any duty to Complainants, much less that NECR acted in a "grossly negligent, reckless, and willful manner." The Board correctly addressed this issue when it stated:

> The dispute centers around fact-bound issues that can most expeditiously and properly be resolved by the courts. Nor is agency expertise required to unravel intricate technical facts. This agency is not charged with the investigation of the cause of train accidents and has little expertise in determining gross negligence, recklessness, and willful misconduct, or in determining damages on the basis of such conduct. Similarly, the expertise of the Board is not needed to resolve other major fact-bound issues that could be dispositive of the matter, such as the condition of the track when the accident occurred, the extent, if any, to which the accident had any connection with track maintenance....

Complaint Decision at 4.

NECR contends that there must be a conclusion that NECR acted in a "grossly negligent, reckless, and willful manner" before it becomes necessary to interpret Section 7.1 of the Agreement. If Complainants cannot prove that NECR acted in such a manner, and NECR strongly contends that it committed no wrong, much less act in a "grossly negligent, reckless, and willful manner," then there is no need for the interpretation that Complainants seek.

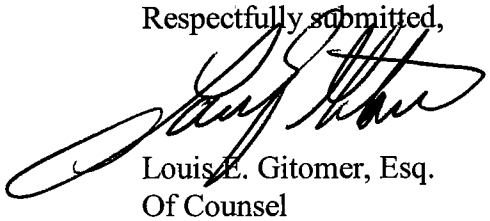
Since Complainants have conceded that a court is better able to evaluate the facts, and the interpretation of the facts is critical to whether Section 7.1 even needs to be interpreted, both administrative and judicial economy suggest that the entity that makes the factual ruling should also interpret Section 7.1, and that the entity be the court.[2] NECR agrees with the Board that the court would be the appropriate forum to resolve the factual and interpretation issues. Certainly the court is as able as the Board to review the language of the Agreement and the parties' positions, as well as the law governing the interpretation of Section 7.1, if necessary.

[2] NECR also urges the Board to indicate that it does not believe that referral of the interpretation of Section 7.1 of the Agreement is necessary or appropriate in this instance involving a derailment.

CONCLUSION

NECR respectfully requests that the Board deny the Petition and uphold its decision dismissing the Complaint.

Respectfully submitted,



Gary A. Laakso, Esq.
Vice President Regulatory Counsel
RailAmerica, Inc.
5300 Broken Sound Boulevard N.W.
Second Floor
Boca Raton, FL 33487
(561) 994-6015

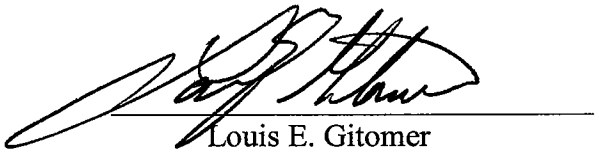
Louis E. Gitomer, Esq.
Of Counsel
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for: NEW ENGLAND CENTRAL RAILROAD, INC.

Dated: March 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for Boston and Maine Corporation and Springfield Terminal Railway Company, by pre-paid first class mail.



Louis E. Gitomer
March 30, 2005